

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

HEATH WHITT, #222 052,)
)
Plaintiff,)
)
v.) CIVIL ACTION NO. 2:18-CV-851-MHT
)
WARDEN MYERS, *et al.*,)
)
Defendants.)

ORDER

The Magistrate Judge has reviewed the answer, written report, and supporting evidentiary materials filed by Defendants (Doc. 17) and determined that Plaintiff should file a response addressing each of the arguments and defenses contained in this report. In filing his response, Plaintiff shall specifically address:

1. Defendants' argument that he has failed to exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a) of the Prison Litigation Reform Act ("PLRA").¹ *Booth v. Churner*, 532 U.S. 731, 741, 121 S.Ct. 1819, 1825 n.6 (2001) ("Congress has provided in § 1997(e)(a) that an inmate must exhaust irrespective of the forms of relief sought and offered through administrative remedies."); *Porter v. Nussle*, 534 U.S. 516, 532 (2002) ("[T]he PLRA's

¹ This section provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." Defendants assert Plaintiff failed to pursue the administrative remedies available to him at the Easterling Correctional Facility with respect to his allegations of failure to provide ADA accommodations. Doc. 17 at 7–8; 24, Doc. 17-5; *see also Braggs v. Dunn*, Civil Action No. 14-CV-601-MHT (M.D. Ala.) — Doc. 728 at 46–47. Specifically, Defendants assert that during Plaintiff's incarceration at Eastlering he failed to submit a request for accommodation regarding the allegations presented in the instant complaint which is required before seeking court intervention regarding his claims. Doc. 17-5.

exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong.”); *Woodford v. Ngo*, 548 U.S. 81, 126 S.Ct. 2378, 2387 (2006) (“[T]he PLRA exhaustion requirement requires proper exhaustion.”). “Proper exhaustion demands compliance with an agency’s deadlines and other critical procedural rules [as a precondition to filing suit in federal court] because no adjudicative system can function effectively without imposing some orderly structure on the courts of its proceedings.... Construing § 1997e(a) to require proper exhaustion ... fits with the general scheme of the PLRA, whereas [a contrary] interpretation [allowing an inmate to bring suit in federal court once administrative remedies are no longer available] would turn that provision into a largely useless appendage.” *Id.* at 2386.

2. Defendants’ assertion that the complaint fails to establish they in any way acted in violation of Plaintiff’s constitutional rights.

Accordingly, it is

ORDERED that **on or before February 1, 2019**, Plaintiff shall file a response to Defendants’ answer and written report. If Plaintiff fails to file a response as required by this order, the court will treat Plaintiff’s failure to respond as an abandonment of the claims set forth in the complaint and as a failure to prosecute this action. Moreover, Plaintiff is specifically cautioned that if he fails to file a response in compliance with the directives of this order the undersigned will recommend that this case be dismissed for such failure. In addition, if Plaintiff fails to respond to the answer and written report with respect to each of the claims raised in his complaint, the court will treat this failure as an abandonment of these claims and shall proceed as justice requires.

As indicated herein, at some time in the future the court may treat Defendants’ report and Plaintiff’s response(s) as a dispositive motion, either a motion to dismiss or motion for summary

judgment, and response.² Thus, in filing a response to Defendants' report Plaintiff should not rely only on his or her unsworn pleadings but should respond by filing sworn affidavits,³ or other evidentiary materials developed through discovery or other appropriate means and which set forth specific facts demonstrating there is a genuine issue of material fact for trial in this case. Failure to file sworn affidavits or other evidentiary materials may result in this court accepting Defendants' evidence as the truth.⁴ If documents are referred to in the opposing affidavits and have not been previously filed with the court, sworn or certified copies of those papers must be attached to the affidavits or served with them.

The parties are hereby notified that, unless within ten (10) days from the date of this order a party files a response in opposition which presents sufficient legal cause why such action should not be undertaken, upon the expiration of the time for Plaintiff to file a response as allowed by this order, the court may at any time thereafter and without further notice to the parties (1) treat the special report and any supporting evidentiary materials as a dispositive motion and (2) after considering any response as allowed by this order, rule on the motion in accordance with the law.⁵

² “[A]n exhaustion defense ... is not ordinarily the proper subject for a summary judgment [motion]; instead, it should be raised in a motion to dismiss, or be treated as such if raised in a motion for summary judgment.” *Bryant v. Rich*, 530 F.3d 1368, 1374-1375 (11th Cir. 2008) (internal quotations omitted); *Trias v. Florida Dept. of Corrections*, 587 F. App’x. 531, 534 (11th Cir. 2014) (District court properly construed defendants’ “motion for summary judgment as a motion to dismiss for failure to exhaust administrative remedies....”).

³ An affidavit is a sworn statement in writing made under oath or on affirmation before a notary public or other authorized officer. The affidavit must be made on personal knowledge, set forth such facts as would be admissible in evidence, and show affirmatively that the affiant is competent to testify to the matters stated in the affidavit.

⁴ If Plaintiff is unable to present, by affidavit, facts essential to justify his opposition to Defendants' report, then Plaintiff must file a sworn statement as to why he or she is unable to do so.

⁵ “When deciding whether a prisoner has exhausted his remedies, the court [will] first consider the plaintiff’s and the defendants’ versions of the facts, and if they conflict, take the plaintiff’s version of the facts as true. ‘If in that light, the defendant is entitled to have the complaint dismissed for failure to exhaust administrative remedies, it must be dismissed.’ *Turner v. Burnside*, 541 F.3d 1077, 1082 (11th Cir.2008) (citing *Bryant*,

Failure to follow the requirements of this order about the proper way to respond to Defendants' report may result in a recommendation of the Magistrate Judge that final judgment be entered in favor of Defendants without there being an evidentiary hearing. Plaintiff is advised that if he asserts compliance with the institutional administrative procedures he must submit relevant evidentiary materials in support of this assertion which demonstrates his proper and full exhaustion of the applicable administrative procedure. His mere conclusory allegation of exhaustion will be insufficient to defeat Defendants' argument.

Done, this 11th day of January 2019.

/s/ Charles S. Coody
UNITED STATES MAGISTRATE JUDGE

530 F.3d at 1373-74). If the complaint is not subject to dismissal at this step, then the court should make 'specific findings in order to resolve the disputed factual issues related to exhaustion.' *Id.* (citing *Bryant*, 530 F.3d at 1373-74, 1376)." *Myles v. Miami-Dade County Correctional and Rehabilitation Dept.*, 476 Fed. Appx. 364, 366 (11th Cir. 2012). Consequently, a district court "may resolve disputed factual issues where necessary to the disposition of a motion to dismiss for failure to exhaust [without a hearing]. See [Turner], 541 F.3d at 1082]. The judge properly may consider facts outside of the pleadings [i.e., evidentiary materials submitted in support of the special report] to resolve a factual dispute as to exhaustion where doing so does not decide the merits, and the parties have a sufficient opportunity to develop the record. *Bryant*, 530 F.3d at 1376." *Trias*, 587 F. App'x at 535.